***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 74-2326

*To be argued by*
DAVID C. BIRDOFF

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-2326**

In the Matter of

D. H. OVERMYER CO., INC. (Michigan),

*Debtor-Appellant,*

and

ROBERT P. HERZOG,

*Receiver-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF APPELLEE FIDUCIARY RESEARCH, INC.

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## QUESTIONS PRESENTED

1. Did the Bankruptcy Court err in refusing to exercise its equitable powers to prevent a termination:

(a) where during the course of the proceeding the landlord afforded the Debtor an opportunity to cure its default by paying all tax and mortgage arrears and the Debtor failed to even make a tender of such arrears;

(b) where the Debtor engaged in inequitable conduct;

(c) where the Debtor's plan of arrangement was held not feasible by both lower courts; and

(d) where the debtor's plan of arrangement was rejected by the Creditors' Committee?

2. Did the lower courts err in their determination that the proposed plan of arrangement was not feasible:

(a) where it failed to provide any indication as to where the Debtor was to obtain funds to make the payments required under the Plan; and

(b) where although afforded an opportunity to reinstate its lease upon payment of a portion of the arrears, the Debtor was unable or unwilling to procure the funds in question?

3. Is a bankruptcy clause in a lease enforceable where there is no public interest in the Debtor retaining the property and the Debtor has failed to pay arrears although afforded an opportunity to do so?

4. Did the District Court err in holding that the Bankruptcy Court need not have set forth specific findings of fact where:

(a) the parties had stipulated to the facts? and

(b) the basis for the Bankruptcy's Court decision was clear and understandable?

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In the Matter of

D.H. OVERMYER CO., INC. (Michigan),

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-and-

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BRIEF OF APPELLEE
FIDUCIARY RESEARCH, INC.

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## Statement

The Debtor and Receiver (hereinafter collectively referred to as "Appellants") appeal from an order of the United States District Court, Southern District of New York (per Werker, J.) which

affirmed an order of the Bankruptcy Court (per Babitt, B.J.), that terminated a lease between the Debtor and the Appellee pursuant to a bankruptcy clause in the lease and awarded possession of the demised premises to the Appellee.

FACTS

On March 7, 1968 Appellee Fiduciary Research, Inc. (hereinafter "Fiduciary") as Landlord, and the Debtor as Tenant, entered into a written lease with respect to certain werehousing facilities known as "Detroit #8" located in the State of Michigan. (Appendix, pg. G-3) The lease was on a standard form prepared by the Debtor. (Appendix, pg. 11) Section 15.01 of the lease provided that the Debtor would be in default if it filed for an arrangement under the Bankruptcy Act, became insolvent, or if a receiver was appointed for its property and was not discharged within 60 days. (Appendix, pg. 12)

Thereafter, the Debtor failed to make the monthly rental payments as provided in the lease for the months of September, October and November of 1973 in the sum of $22,205.40, and failed to pay real

estate taxes as provided therein in the sum of $50,344.58 for the years of 1971 and 1972. Estimated unpaid taxes for 1973 are $27,000. (Appendix, pg. G-3)

On November 16, 1973, the Debtor filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York, and a receiver for its property was appointed. (Appendix, pg. 30)

On December 3, 1973, in accordance with the provisions of the lease, Fiduciary sent a written notice to the Debtor terminating its leasehold interest in the premises. (Appendix, pg. G-3)

Fiduciary then applied to the Bankruptcy Court for an order terminating the lease between itself and the Debtor with respect to Detroit #8. Fiduciary's application was predicated upon 1) the "bankruptcy clause" contained in the lease; 2) the Debtor's failure to pay rent for September, October and November of 1973; and 3) the Debtor's failure to pay

real estate taxes, as required by the lease, for the years 1971, 1972 and 1973. (Appendix, pp. G-1 to G-12) Fiduciary further alleged that the Debtor also breached its obligations under the lease to make repairs and to keep the premises in good condition.

Subsequently, the Debtor proposed a plan of arrangement. The plan was rejected by the Creditor's Committee. (Appendix, pg. 18) Both the Bankruptcy Court (Appendix, pg. 53) and the District Court (Appendix, pp. 24-25) found that the plan was not feasible.

On January 30, 1974, Fiduciary's application was heard by the Bankruptcy Court. The parties then stipulated that rent had not been paid for September, October and November of 1973 ($21,600) and that unpaid taxes plus the rental arrears were $95,000. Appellants also conceded that as of that date, the leased premises needed repairs totalling $10,000.00 (Appendix, pp. G 3, 6).

At the hearing, Fiduciary stipulated to withdraw its application to terminate the lease and to allow the Debtor to occupy Detroit #8 until the expiration of the lease if the Debtor would merely pay all tax and mortgage arrears* within 30 days thereafter. (Appendix, pp. G-1 to G-12). Despite this offer, the Debtor failed to make any payments or to even tender the tax and mortgage arrears.

By order dated August 6, 1974, the Bankruptcy Judge granted Fiduciary's application to terminate the lease and awarded possession of the premises to Fiduciary. (Appendix, pp. 7-25)

On October 4, 1974, the District Court affirmed the Bankruptcy Court's decision. (Appendix, pp. 26-55)

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* The existing mortgage arrears were less than the rental arrears. The balance of the rental arrears was to be amortized over the life of the lease.

## POINT I

THE COURT BELOW DID NOT ERR WHEN IT REFUSED TO EXERCISE ITS DISCRETION AND PREVENT TERMINATION OF THE LEASE BECAUSE A) THE EQUITIES ARE BALANCED IN FAVOR OF FIDUCIARY AND B) THE APPELLANTS HAVE NOT MET THE STANDARDS OF QUEENS BLVD.

Appellants argue that both lower courts abused their discretion in enforcing the Debtor's contractual obligations as contained in the bankruptcy clause of its lease with Fiduciary.

The enforcement of such a bankruptcy clause is within the equitable discretion of the Bankruptcy Court. In re Queens Blvd. Wine & Liquor Corp., CCH Bank. Rep. ¶65,293 (Current) (2d Cir. 1974) (hereinafter "Queens Blvd."). Appellants have assumed throughout these proceedings, that the mere filing of a Chapter XI petition allows the Debtor to avoid its contractual obligation irrespective of the harm that innocent third parties might suffer. However, the Bankruptcy Court, as well as the District Court, determined that the equitable considerations herein were in favor of Fiduciary, as Landlord, and not the Debtor as Tenant. Such a determination cannot be set aside on appeal unless there was an abuse

of discretion. Behringer v. Lybrand & Morgan, 270 F.2d 670 (10th Cir. 1959 ). Even if this Court might have reached a different conclusion, it is insufficient cause to disturb the lower court's determination. Teasdale v. Sefton Nat. Fibre Can Co., 85 F. 2d 379 (8th Cir. 1936). Moreover, the findings of fact made by the Bankruptcy Court cannot be disturbed unless they were clearly erroneous [In re Simon v. Agar, 299 F.2d 853 (2d Cir. 1962)], especially where, as here, those findings coincide with the conclusions of the District Court. Manson v. Williams, 213 U.S. 71 (1909); Page v. Rogers, 211 U.S. 575 (1909); In Re Carlton Crescent, Inc., 173 F.2d 944 (2d Cir. 1949), aff'd 338 U.S. 304 (1950).

Appellants have failed to make the requisite showing that the lower courts abused their discretion or made clearly erroneous findings of fact with respect to Fiduciary's application.

Both lower courts, after reviewing the recent decision of this Court in Queens Blvd, held that there were no special or compelling equitable circumstances which justified a refusal to enforce the bankruptcy clause contained in the lease between Fiduciary and the Debtor.

A. EQUITY REQUIRES A RETURN OF THE PROPERTY TO FIDUCIARY

Appellants, for their own convenience, have elected to treat approximately twenty landlord applications in a consolidated fashion. In their respective briefs, Appellants make no reference to Fiduciary or to the issues raised by Fiduciary's application.* Fiduciary respectfully submits that its application raises different issues than those of the other landlords due to the unique and compelling facts surrounding the Debtor's behavior with respect to Fiduciary.

These unique circumstances include an offer by Fiduciary to withdraw its application if tax and mortgage arrears were made current--which offer the Debtor failed to accept.

Throughout these proceedings, and on this appeal, Appellants have argued that the warehouse facilities are a valuable asset and that regardless of the Debtor's defaults

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* Appellants discuss the following properties: Boston #6 and 7, Buffalo #2, Camden #2, Columbus #3, Denver #4, Edison #24, Jacksonville #3, Minneapolis #4 and Richmond #1.

The only mention of Detroit #8 in the Receiver's brief is the innocuous statement, on pg.73, that the facts regarding the Debtor's defaults were stipulated to.

under the lease, it is still entitled to retain the property to the substantial and continued detriment of Fiduciary as landlord-owner. Appellants coveniently omit from their briefs any reference to (1) the $95,000 in arrears owed by the Debtor to Fiduciary, (2) Fiduciary's offer during these proceedings to withdraw its application and to reinstate the lease upon the Debtor's payment of all tax and mortgage arrears -- the offer was rejected by the Debtor, and (3) the Debtor's failure to properly maintain the premises (On January 30, 1974, Appellants conceded that $10,000 in repairs were needed). Upon these facts, the courts below held that there were no compelling equitable considerations which justified the Debtor's retention of the property and the denial of Fiduciary's application.

The Debtor has repeatedly argued that the Detroit #8 lease could be utilized to obtain new

financing for its operations and that such new financing could be utilized to cure defaults in its payment of rent, mortgage, and tax payments. When queried as to why such financing could not presently be obtained, the Debtor argued that no lender would advance funds until the Debtor's right to possession had been finally determined.

In point of fact, even when Fiduciary consented in open Court on January 30, 1974 to the Debtor's remaining in possession upon payment of the tax and mortgage arrears, the Debtor failed to obtain its promised financing. Thus the Debtor still acts in a dilatory fashion, and its behavior has demonstrated that, contrary to its assertions, it will never be able to pay the arrears.

When the Debtor was "put to the test" to procure the necessary financing, it completely and utterly failed. To continue the Debtor in possession under these circumstances would be an injustice to Fiduciary -- and Fiduciary has most

certainly given this Debtor every opportunity to rehabilitate itself.

Thus, for Appellants to argue that the District Court erred in its conclusion that the Debtor's conduct demonstrated an "intention to deceive" is specious. Not only did the Debtor engage in such conduct prior to the institution of these proceedings (See pp. 56-58 of Receiver's brief), but such conduct has continued even in these proceedings (supra, pp. 7, 12).

B. THERE ARE NO COMPELLING CIRCUMSTANCES WHICH WARRANT JUDICIAL INTERFERENCE WITH ENFORCEMENT OF THE CONTRACTUAL OBLIGATIONS OF THE DEBTOR

Bankruptcy clauses, such as the one at issue herein, are enforceable in Chapter XI proceedings. Bank. Act §70(b), 11 U.S.C. §110(b); Speare v. Consolidated Assets Corp., 360 F. 2d 882 (2d Cir. 1966); Geraghty v. Kiamie Fifth Ave. Corp., 210 F.2d 95 (2d Cir. 1954).

The only known case in this Circuit which granted relief from forfeiture in a Chapter XI proceeding is In re Queens Blvd. Wine & Liquor Corp.,

CCH Bank. Rep. ¶64,778 (1970-73 Transfer Binder) (E.D.N.Y. 1973), aff'd CCH Bank. Rep. ¶65,293 (Current) (2d Cir. 1974) wherein the Court held there were special compelling circumstances to warrant the relief in question. There the debtor's business consisted of a liquor store operation and was operated solely from one location - the leased premises in question. The rent for the premises which was due on March 1, 1972 was not paid and on March 22 the landlord instituted summary proceedings to obtain possession of the premises; on the same day the debtor filed a petition for an arrangement under Chapter XI. On April 4 the debtor offered to pay the unpaid rent in full but the offer was rejected by the landlord. On May 11, 1972, the debtor tendered a certified check to the landlord for the full rent for March, April and May, and the certified check was also rejected. At that time and throughout the proceedings, the landlord was holding an $8,000.00 security deposit which was more than sufficient to cover the rental arrears. Shortly thereafter, the

creditors tentatively accepted a plan of arrangement. Under these special and highly unique circumstances it was held that the lease had not been forfeited.

The decision in Queens Blvd., supra, was an exception to the general rule that such bankruptcy clauses are enforceable. It is significant to note, that this Court stated therein:

> Our decison does not deprive Section 70(b) of its statutory effect in those cases to which it is applicable. Bankruptcy forfeiture provisions are necessary for the protection of landlords and generally are enforceable. We hold only that, under the particular circumstances of this case, termination of Queens' lease would be grossly inequitable and contrary to the salutory purpose of Chapter XI. CCH Bank. Rep (1974) Current, p. 74,951.

Both the Bankruptcy Court and the District Court reviewed this Court's decision in Queens Blvd. and held that there were no compelling special circumstances which justified the exercise of the court's equitable powers to prevent a termination.

Bankruptcy Judge Babitt noted that the rent arrears in Queens Blvd. were for only one month and that the landlord held a security deposit which was more

than ample to cover the past due rent; that the tenant had tendered the rent, but that the landlord refused to accept payment in the hope of obtaining a more affluent tenant; that the tenant's plan of arrangement was on the verge of confirmation by reason of its successful operation during the Chapter XI proceeding; and that the Court of Appeals found evidence to indicate an estoppel on the landlord's part to invoke the bankruptcy clause since the landlord had agreed not to forfeit the lease if the tenant made prompt rent payments.

Bankruptcy Judge Babitt then contrasted the debtor in Queens Blvd. with the Debtor herein; he noted that (Appendix, pp. 51-54):

1. The defaults here are staggering and only substantial divestment of some of the Debtor's warehouses had given the Receiver funds to operate even marginally.

2. Many of this Debtor's landlords had to invest their own funds to keep the mortgagees and tax collectors at bay.

3. The twenty properties sought to be

recovered were not the Debtor's only warehouses.

4. The Debtor had not tendered pre-petition debt (rent and taxes) to the landlords.

5. The Debtor's proposed plan of arrangement "carries pie-in-the-sky elements"; although it calls for the full payment of pre-petition debt, such debt would not be paid upon confirmation of the plan but over a twenty-year period.

6. There was no strong public interest involved so as to preclude enforcement of the bankruptcy clauses under §70b of the Bankruptcy Act.

Judge Babitt then held:

> ...I am satisfied that given the enforceability of the lease provision here in issue as mandated by Section 70b of the Act, and inter alia, Finn v. Meighan, supra, the so-called equitable concerns are simply not robust enough to turn these landlords away. There is simply no strong public interest here to support such a result. (Appendix p.54)

District Judge Werker, not only concurred with Judge Babitt's decision, but went even further in determining that the Debtor presented no compelling

reasons for any exercise of the Court's equitable powers, noting:

> *** It is not every corporate entity, however, that can be successfully rehabilitated under Chapter XI, and not every Chapter XI proceeding which requires such exercise of discretion. In re Webcor Inc., 392 F.2d 893 (7th Cir.), cert. denied, 393 U.S. 837 (1968). See also SEC v. American Trailer Rentals Co., 379 U.S. 594, 618 (1965).
>
> If the plan of arrangement is feasible and if it appears that there are compelling equitable and policy considerations for preventing forfeiture, then the bankruptcy default clauses may be deemed inconsistent with the rehabilitative nature of a reorganization proceeding. Queens Boulevard Wine & Liquor Co. v. Blum, supra, at 4120; Weaver v. Hutson, 459 F. 2d 741 (4th Cir.), cert. denied, 409 U.S. 957 (1972); In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964); Smith v. Hoboken R.R. 328 U.S. 123 (1946). While equity historically has been the forum in which forfeitures may be set aside, no one has suggested that when the equities appear to be evenly balanced or balanced on the side of the forfeiture the Court should grant such relief. (Emphasis supplied.) (Appendix pp 14-15)

Judge Werker then found that:

1. The proposed plan of arrangement "simply cannot be characterized as feasible." (Appendix pp. 24,25)

2. The conduct of the Debtor "formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations", specifically noting that:

> Just prior to filing its Chapter XI petition, Overmyer made promises with respect to remedying these defaults which could only have been made with an intention to deceive. (Appendix p.15)

In conclusion he noted:

> ***there was no abuse of discretion on the part of the Bankruptcy Judge in failing to exercise his discretion in favor of the appellants. It is also this Court's conclusion that Overmyer, because of the nature of its business operations and its failure to meet its several obligations, simply cannot be rehabilitated.

## POINT II

## THE COURTS BELOW DID NOT ERR IN THEIR DETERMINATIONS THAT THE PROPOSED PLAN OF ARRANGEMENT IS NOT FEASIBLE

### A. The Proposed Plan is Not Feasible

Both the Bankruptcy Court and the District Court held that the proposed plan was not feasible. Unless this decision was clearly erroneous, it cannot be overturned on appeal. In United Properties, Inc.

v. Emporium Department Stores, Inc., 379 F.2d 55, 64 (8th Cir. 1967), the court held that the test to be applied in determining whether a lower court's decision in holding whether a plan is feasible is whether the decision was clearly erroneous. The court quoted Justice Blackmun's statement of the clearly erroneous doctrine as follows:

> ***whether although there is supporting evidence, "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. [O'Rieley v. Endicott-Johnson Corp., 297 F.2d at 6.]

From the record below, the only definite and firm conviction which can be drawn about the plan is simply that it is not feasible.

Appellants argue that Judge Babitt misconstrued the plan; however, no claim is made by Appellants that Judge Werker misconstrued the proposed plan. In fact, a reading of Judge Werker's decision indicates exactly the opposite, for in his decision, he fully set forth the pertinent provisions of the plan (Appendix, pp. 18-19).

The pre-petition debt of the Debtor is well in

excess of $12,000,000 (Appendix, pg. 34). The proposed plan of arrangement provides for each landlord whose lease has not been terminated to be paid in full upon confirmation, and all other creditors, including landlords whose property has been returned, to be paid 1% of the amount owed every two months until fully paid. No where does the plan afford any explanation as to how these payments are to be financed. As demonstrated on pages 7 and 12 of the brief, the Debtor could not even obtain sufficient funds to pay the mortgage and tax arrears on Fiduciary's property, which were less than $100,000.00.

Although the Receiver has gone to great length to produce a projected income flow, attached as Schedule A to his brief, that schedule is misleading; the Receiver's computations as to projected income are, to say the least, highly speculative since the subleases are short-term and the computations assume that the premises will be completely sublet for each year over a seventy-four year period. In this regard, Judge Werker stated (Appendix, pp. 17-18, Fn. 7):

> The record does not contain proof of the value of any "windfall." Both the receiver and the debtor append charts of projected profitability to their briefs. The projected profits are based on the assumption that the warehouses will be continuously occupied over the lifetimes of the leases. Economic prognostication is difficult enough in the short run. Such difficulty is magnified when trying to predict the condition of events thirty or forty years into the future ***.

B. Rejection of the Proposed Plan of Arrangement By the Creditors Committee was Proper

The Receiver has charged Fiduciary with having a conflict of interest with respect to the action of the Creditor's Committee in rejecting the Plan. (Receiver's brief pp. 41-44). The Receiver argues (Receiver's Brief pp. 40-41):

> The real reason why this plan has not been accepted by the creditors committee is not because it lacks feasibility, but because it presupposes the continuation of the long-term leases at bar. The creditors committee is represented by the attorneys who also represent the very landlords seeking to deprive the debtor's plan of its most valuable assets, namely the leases. Should they succeed in obtaining the windfall benefit of unencumbered possession of the warehouses, these landlords will appropriate assets with a value far exceeding the amount of their claims, will impair the viability of the plan to the detriment of

> other unsecured creditors and will wind up with more than one hundred cents on the dollar while every other unsecured creditor receives substantially less either by way of confirmation of a modest plan or liquidation in bankruptcy.

This charge is totally unfounded for not only is Fiduciary not a member of the Creditors' Committee*, but as demonstrated supra, pp. 7,12 , it has given this Debtor, even in these proceedings, every opportunity to rehabilitate itself. Contrary to the Appellants' argument that the property is valuable to the Debtor, the Debtor was unable to obtain any financing on Detroit #8, although offered an opportunity to do so by Fiduciary (supra, pp. 7,12 ).

Moreover, Appellant's argument as to the windfall, which Fiduciary purportedly is to receive was rejected in toto by the District Court which stated (Appendix 17):

> Overmyer also argues that if this Court affirms the decision of the Bankruptcy Judge, and the leases are terminated, the landlords will receive a "windfall." In view of the short-term nature

*Fiduciary's attorneys do not and have not represented the Creditors' Committee.

> of the subleases and the expenses involved in operating the warehouses, this so-called "windfall" is largely illusory and does not shift the balance of the equities.

Thus, both lower courts, after a complete review of the record herein were left with a definite and firm conviction that the proposed plan of arrangement is not feasible. Appellants, although they contest the finding, refer to nothing in the record which refutes the lower court's determination.

Appellant's reference to the Tampa 3 decision (Receiver's Brief pp 41-42) is misleading for that case has not been affirmed by the District Court, as Appellants would have it appear. As conceded by Appellants, (Receiver's Brief p.42) the District Court found that the Tampa 3 decision [illegible]mpletely distinguishable from the cases on appeal. M[illegible]ver, the District Court's decision in this case is that the plan is not feasible. Since the District Court has not yet heard the appeal of the Tampa 3 decision, it is most inappropriate to utilize the Bankruptcy Court's decision therein as a basis for arguing that the District Court, as an Appellate Court, erred.

## POINT III

EVEN IF THE LOWER COURTS ERRED AS TO THE FEASIBILITY OF THE PROPOSED PLAN, THE BANKRUPTCY CLAUSE IS STILL ENFORCEABLE SINCE THE DEBTOR HAS FAILED TO PAY ALL ARREARS UNDER THE LEASE AND THERE IS NO OVERRIDING PUBLIC INTEREST PREVENTING TERMINATION

As indicated in Point I B, supra pp. 13-19, absent special circumstances, bankruptcy clauses, such as the one at issue herein, are enforceable in bankruptcy proceedings. Bank. Act §70(b), 11 U.S.C. §110(b); Finn v. Meighan, 325 U.S. 300 (1945); Speare v. Consolidated Assets Corp., 360 F. 2d 882 (2d Cir. 1966).

Unless the debtor has either paid or tendered all arrearages or unless there is an overriding public interest, the courts will enforce such clauses.

In each of the cases cited by the appellants either of these two elements was present. The public interest in the continued operation of a railroad is not present in this case as it was in Smith v. Hoboken R.R. Warehouse v. S.S. Connecting Co., 328 U.S. 123 (1946), nor is there a large public investment as there was in In re Fleetwood Motel Corp., 335 F.2d 857 (3rd Cir. 1964). Neither Appellant argues, and the record is completely barren of any fact to support, that

there is any compelling, public need for the debtor to occupy Detroit #8.

Moreover, it was conceded by Appellants that the Debtor did not tender any of the arrearages to Fiduciary (Appendix G-8). The Debtor failed to tender such arrears even though offered an opportunity to do so by Fidiciary in these proceedings (supra pp 7,12 ). Thus, Appellant's reliance upon In re Queens Blvd. Wine & Liquor Corp.,CCH Bank Rep. ¶65,293 (current) (2d Cir. 1974) and In re The Sire Plan, Inc., 221 F.Supp 68 (SDNY), aff'd in part, mod. in part, sub nom Fifty Seven Associates v. Joseph, 322 F.2d 120 (2d Cir. 1963) is misplaced since in those cases either the arrears had been tendered (as in Queens Blvd., supra) or the court indicated that if the arrears were not paid, the property would be returned to the landlord (as in Sire Plan, 322 F.2d at 121).

Therefore, the lack of any overriding public interest herein and the Debtor's failure to cure its defaults, although afforded an opportunity to do so, in and of themselves preclude the Debtor from regaining the property.

## POINT IV

THE DISTRICT COURT DID NOT ERR WHEN IT HELD THAT THE BANKRUPTCY COURT NEED NOT HAVE SET FORTH SPECIFIC FINDINGS OF FACT SINCE (A) THE FACTS WERE STIPULATED BY THE PARTIES AND (B) THE BASIS OF THE BANKRUPTCY COURT'S DECISION WAS CLEAR.

### A. Specific Findings of Fact Were Unnecessary Because The Facts Were Stipulated.

Both the Receiver and the Debtor have argued that the Bankruptcy Judge committed error when he failed to set forth his specific findings of fact in his opinion. However, the law is well-settled that specific findings are unnecessary where there is no dispute as to the facts--and during the trial on Fiduciary's application to terminate the lease the facts were stipulated to by the parties. See In Re Metropolitan Realty Corp., 433 F.2d 676 (5th Cir. 1970).

In Metropolitan, supra, the putative debtor appealed from an order dismissing a petition for reorganization. The court rejected the appellant's argument that error was committed by the court below for failure to make specific findings of fact as required by FRCP 52(a) (the counterpart to and model for Bankruptcy Rule 752). It reasoned (433 F.2d 680):

> Where, as here, there are no genuine material factual issues presented, specific findings of fact and separate conclusions of law are not required.

The case of In re Woodmar Realty Co., 384 F.2d 776 (7th Cir. 1967), cert. den. 389 U.S. 1040 (1968) also demonstrates that the Bankruptcy Judge was not required to restate the stipulated facts. In Woodmar the debtor appealed from an overruling of its objection to fee and expense allowances to the bankruptcy trustee and the trustee's attorney. The court rejected the debtor's argument that specific findings of fact were required, reasoning id. at 780:

> Specific findings of fact were unnecessary, since the orders pursuant to the motion for summary judgment allowing the claims found that no genuine material issues of fact were presented.

B. Specific Findings of Fact Were Unnecessary Because the Basis of the Bankruptcy Court's Decision is Understandable.

Moreover, it is clear that "if a full understanding of the question presented may be had without the aid of separate findings" such findings are unnecessary. 5A Moore's Federal Practice (1974) ¶52.06[2] quoting Shellman v. Shellman, 95 F.2d 108, 109 (D.C. App. 1938). The District Court found (Appendix, pp. 21-22) that:

> The essential findings with respect to the leases terminated before and after the filing of Chapter XI petitions are contained in Judge Babitt's memorandum decision at pages 9, 10, and 11. These findings are sufficient under Bankrupty Rule 752 for they afford a clear understanding of the grounds on which the Banktuptcy Judge based his decision. [Footnote omitted.]

The purpose of findings of fact is to aid the appellate court by affording it a clear understanding of the basis for the lower court's decision. United States v. Horsfall,270 F.2d 107 (10th Cir. 1959). As is evident from the foregoing, the District Court, as an appellate court, most certainly had a complete understanding of the grounds upon which Bankruptcy Judge Babitt rendered his decision.

Thus it is clear that the Bankruptcy Court's failure to set forth specific findings of fact regarding Fiduciary's application is not reversable error since those facts are readily evident from the Court's decision and the Stipulation of Facts entered into between Appellants and Fiduciary.

## CONCLUSION

For the reasons stated above, the order appealed from should be affirmed in all respects.

Respectfully submitted,

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DATE November 12, 1974